



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Beneco Enterprises, Inc.

File: B-239543.3

Date: June 7, 1991

Patrick S. Hendrickson, Esq., Howell, Fetzer & Hendrickson, for the protester.

James A. Mundt, Esq., Warren, Mundt, and Martin, P.C., for Eastern/JBI, Terry L. Childers for Childers Construction Company, Inc., and John de la Garza for E.T. LaFore, interested parties.

Joseph M. Goldstein, Department of the Air Force, for the agency.

Linda C. Glass, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Agency properly determined that joint venture qualified as a small disadvantaged business (SDB) where agency reasonably found that the SDB member has both control over the joint venture pursuant to a joint venture agreement which indicates that the SDB member controls at least 51 percent of venture, contributes 51 percent of the working capital, determines venture working capital requirements, controls the venture bank accounts, makes all day-to-day operational decisions, purchases all necessary supplies and equipment for performing requirement, and has the financial capability to obtain necessary bonds.

2. Award to higher technically-rated offeror, while not the lowest-priced offeror but lower priced than protester, is not objectionable where solicitation award criteria made technical considerations more important than price, and the agency reasonably concluded that the awardee's proposal was the most advantageous.

3. Where agency concluded that awardee could perform at the offered price and was responsible, awardee's allegedly below-cost offer is no basis to disturb the award.

### DECISION

Beneco Enterprises, Inc. protests the award of a contract under request for proposals (RFP) No. F05611-90-R-0005 to Eastern/JBI, a joint venture between Eastern Colorado Builders, Inc., a small disadvantaged business (SDB), and

John Bowman, Inc., a non-SDB. The RFP, as amended, was a 100-percent SDB set-aside for maintenance, repair, and minor construction services referred to as Simplified Acquisition Base Engineering Requirements (SABER) for the United States Air Force Academy, Colorado. Beneco contends that Eastern/JBI is ineligible for award because it does not qualify as an SDB. Beneco also argues that Eastern/JBI's offer should have been rejected because it was "nonresponsive" and unrealistically priced.<sup>1/</sup>

We deny the protest.

The RFP was issued on April 10, 1990, on an unrestricted basis to fill a continuing need for SABER services. The services at that time were being performed under contract with Bowman due to expire in December 1990. The contracting officer subsequently determined that the solicitation should be set aside for SDB concerns. That determination was based on statements of interest from SDB concerns and review of the applicable rules and regulations governing SDB set-asides. Accordingly, on April 20, 1990, the agency issued amendment No. 0001 setting the solicitation aside for SDBs. The closing date was then extended to June 22.

On May 4, Bowman filed a protest with our Office objecting to the SDB set-aside, arguing that the Department of Defense Federal Acquisition Regulation Supplement (DFARS) provisions authorizing the SDB set-aside conflict with the Small Business Competitiveness Demonstration Program (SBCDP) Act of 1988, 15 U.S.C. § 644 note (1988), and the Federal Acquisition Regulation (FAR) implementation, FAR subpart 19.10 (FAC 84-56). Bowman also argued that the SDB set-aside was improper because the contracting officer had no basis to conclude that at least two responsible SDB concerns would compete.

We denied the protest and found that there was no conflict between the SBCDP Act, the FAR and DFARS. We stated that the SBCDP Act established a demonstration program under which solicitations for construction services are to be issued on an unrestricted basis where the agency has attained its small business participation goals. However, the Act specifically provides that set-asides for SDBs under section 1207 of the 1987 Defense Authorization Act, 10 U.S.C. § 2301 note (1988), which DFARS implements, are exempt from the demonstration program. Since the demonstration program, by the specific terms of the SBCDP Act, was not applicable where there was a

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<sup>1/</sup> Since the concept of responsiveness does not apply to negotiated procurements, we assume Beneco is arguing that Eastern/JBI's proposal should have been rejected as technically unacceptable.

set-aside under section 1207, we found nothing inconsistent between the law and the FAR and DFARS implementation. Therefore, we found no basis to object to the set-aside as inconsistent with the SBCDP Act. We also found that the contracting officer reasonably concluded that offers would be obtained from two responsible SDB firms at a price not exceeding fair market price by more than 10 percent. John Bowman, Inc., B-239543, Aug. 28, 1990, 90-2 CPD ¶ 165.

The RFP contemplated the award of a fixed-priced indefinite delivery, indefinite quantity contract for a base year and 3 option years. Award was to be made on the basis of the most advantageous offer based on two major evaluation factors listed in the solicitation in descending order of importance--management and technical. Offerors were advised that management and technical were more important than price and that award would not be made strictly on price and price-related factors.

The RFP further provided that in evaluating price, the government would assume that 95 percent of the work would be performed during standard work hours and the remaining 5 percent would be assumed to be performed on nonstandard work hours. The RFP required offerors to provide a pricing percentage coefficient for standard and nonstandard work hours. (The percentage coefficient could be "net," "decrease from," or "increase to" unit prices listed in a SABER unit price book.) To arrive at the true coefficient for price evaluation, the RFP provided that the offerors' proposed coefficient for standard work hours would be multiplied by .95 and added to the proposed coefficient for nonstandard work hours multiplied by .05. The RFP advised that the price coefficient would be evaluated for completeness and reasonableness, and consideration of any risks associated with the proposed technical approach.

Nine offers were received by the closing date of June 22, 1990. The offers received were evaluated using a color rating of blue (exceptional), green (acceptable), yellow (marginal), and red (unacceptable). After the initial evaluation, four of the offers received a red color code rating and were determined to be outside the competitive range.

During the course of the initial evaluation, the contracting officer, having doubts about Eastern/JBI's qualification as an SDB concern, wrote a letter, dated July 20, 1990, to the Small Business Administration (SBA) Region VII office, seeking advice. By telephone conversation of July 26, 1990, the contracting officer was advised by the SBA not to question the certification contained in the joint venture offer (Eastern certified that it was an SDB concern; JBI did not).

Discussions then were conducted with all competitive range offerors. After discussions, responses to requests for clarifications were submitted and evaluated. On October 22, 1990, best and final offers (BAFOs) were requested with a closing date of October 26.

The BAFOs received were also given color ratings. Eastern/JBI received an overall rating of exceptional and was determined to be the most advantageous offeror. Eastern/JBI was considered the most technically qualified with sound financial backing, experienced staff, previous experience with similar contracts, and as having a well-established relationship with local contractors. Beneco also received an overall rating of exceptional. Although the evaluators considered Beneco to be well-established, with good experience on a similar contract and financially sound, they found that Beneco had not established relationships with subcontractors and would require a learning period in order to establish this relationship.

The results of the final proposal evaluation were presented to the source selection authority (SSA). The SSA found that Eastern/JBI's proposal represented the best overall value to the government. The SSA stated that while Eastern/JBI did not offer the lowest overall price, its superior capabilities and low risk outweighed the lowest-price offeror, which was rated marginal and the least qualified with the highest risk. Another offeror had a slight price advantage over Eastern/JBI but also had a lower technical rating. Although Beneco was rated exceptional, its price was higher than Eastern/JBI's price. Eastern/JBI was awarded the contract on January 24, 1991. This protest was filed on February 4.

The protester first contends that Eastern/JBI does not qualify as an SDB. Under the Department of Defense's (DOD) regulations, an SDB eligibility protest must be filed with the contracting officer who then forwards the protest to the SBA for a conclusive determination. DFARS § 219.302 (DAC 88-14).<sup>2/</sup> Although this is a matter for SBA determination, SBA has not yet issued regulations containing criteria for determining a joint venture's status as an SDB concern and

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<sup>2/</sup> While Beneco did not file a protest with the contracting officer challenging the SDB status of Eastern/JBI, another offeror, Childers Construction Company, did. However, that protest was dismissed by the SBA on March 14, 1991, for failing to specify a basis for challenging the disadvantaged status of the protested concern. In this dismissal, SBA stated that it is currently the policy of SBA to limit the determination of SDB status to the purported SDB participant in the joint venture.

currently declines to make SDB status determinations for joint ventures under DOD's section 1207 program. See SamCorp. General Contractors, B-241740, Feb. 21, 1991, 91-1 CPD ¶ 198.

In instances where the SBA declines to make this determination, DOD has no alternative but to determine itself the joint venture's SDB status. O.K. Joint Venture, 69 Comp. Gen. 200 (1990), 90-1 CPD ¶ 170; see also Washington-Structural Venture, 68 Comp. Gen. 593 (1989), 89-2 CPD ¶ 130. In such cases, we review DOD's determination to see if it is reasonable. See, e.g., SamCorp. General Contractors, B-241740, supra.

The solicitation defines an SDB as a small business that is at least 51 percent owned by one or more individuals who are socially and economically disadvantaged. The solicitation further provides that the concern's management and daily business operations must be controlled by one or more of such individuals and that the majority of earnings must directly accrue to the disadvantaged owners.

The contracting officer reviewed a copy of the Eastern/JBI joint venture agreement to determine which firm will actually exercise control over the joint venture and manage the day-to-day operations of the project. She specifically found that under the joint venture agreement Eastern controls 51 percent of the joint venture. She found that the agreement calls for all necessary working capital to be furnished by both companies in the same proportion as their respective venture interests and that Eastern has the responsibility to determine venture working capital requirements. The agreement provides that the joint venture bank accounts are under the control of Eastern and that deposits and withdrawals are controlled by Eastern. The agreement also provides that all joint venture business, including but not limited to management, methods and manner of performance of work, management powers and duties are delegated to Eastern and any delegation of this authority is to be determined by Eastern. The agreement further provides that Eastern has the power and authority to make all day-to-day operational decisions concerning the project, that Eastern is to purchase and acquire all equipment and supplies necessary for the performance of the work, and that any applicable records and data are under the control of Eastern. The costs for storage will be paid in accordance with venture interests, and Eastern will determine cash asset requirements and will distribute such cash in accordance with venture interests. Finally, the agreement provides that the bond liability of each firm is to be in the same proportion as its venture interest.

We find that the contracting officer reasonably determined that the Eastern/JBI joint venture was eligible to participate

in the procurement. Eastern has majority control, a majority of the profits will accrue to Eastern, and Eastern will be correspondingly liable for a majority of all losses. Cf. Washington-Structural Venture, supra. Eastern will maintain all administrative records and facilitate the acquisition of equipment necessary to perform the work. Cf. O.K. Joint Venture, 69 Comp. Gen. 200, supra. Finally, Eastern, in and of itself, has bonding capability in excess of the solicitation requirements. Since the SDB member of the joint venture has 51 percent control, is responsible for management and day-to-day operations, and will share in a majority of the profit or loss, the contracting officer could reasonably conclude that the joint venture qualified as an SDB under the section 1207 program.

Next, Beneco complains about the evaluation that resulted in a high rating for the joint venture, contending that if Eastern/JBI is considered a new organization, it has no experience in multi-project contracts, SABER contracts, purchasing systems, years in business, and reputation. Beneco, recognizing that Eastern/JBI's price is lower, also argues that its own experience, management, and technical ability make it superior in the field of multi-project and SABER contracts.

We will examine an agency's evaluation to ensure that it was fair and reasonable, and consistent with the evaluation criteria stated in the RFP. Research Analysis and Maintenance, Inc., B-239223, Aug. 10, 1990, 90-2 CPD ¶ 129. A protester's disagreement with the agency's evaluation is itself not sufficient to establish that the agency acted unreasonably. Id. Here, after reviewing the record, we conclude that the evaluation was fair and reasonable, and in accordance with the RFP's stated evaluation criteria.

The record shows that Eastern/JBI and Beneco both received exceptional ratings. Both offerors were found to excel in the management and technical areas. In the area of management, the evaluation team considered personnel allocation, teaming/subcontracting approach, organizational structure, purchasing system/level of subcontracting, and quality control. In the area of technical, the evaluation team considered previous experience, financial capability, and years in business.


The joint venture agreement between Eastern and JBI states that Eastern, the SDB, shall have 51 percent control of the venture. In the Eastern/JBI proposal, Eastern listed 26 projects it had been awarded within the last 4 years, 17 of which were in excess of \$100,000 and 1 in excess of \$450,000. Further, Eastern's performance history for the year 1990 reflected total contract work in excess of \$1,600,000. The proposal also identified Bowman's extensive SABER experience.

The record shows that the evaluation team relied on the capabilities of both parties to the joint venture to determine their technical acceptability. We find nothing improper in the agency's evaluation since both parties will be responsible for performing the work. Separate qualifications of each of the legal entities in a joint venture properly can be considered in evaluating the qualifications of the joint venture. Parker-Kirlin Joint Venture, B-213667, June 12, 1984, 84-1 CPD ¶ 621. On this basis, the Eastern/JBI joint venture was rated exceptional, as was Beneco. However, Eastern/JBI proposed a lower price. Under these circumstances, the agency could reasonably determine that it was in the government's best interest to award to Eastern/JBI at its lower price.

Finally, Beneco contends that Eastern/JBI's failure to accurately calculate accumulated interest in its price coefficients has resulted in an unrealistic, below-cost offer.

The record shows that the agency performed a price analysis of the method used by Eastern/JBI to compute its coefficients and determined that the coefficients were complete, realistic and comparable to the agency's estimates. The Air Force made award to Eastern/JBI after concluding that it could perform at the offered price and necessarily determined that the firm was responsible. Thus, that firm's alleged below-cost offer is no basis to overturn the award. DH Indus., B-232963, Jan. 25, 1989, 89-1 CPD ¶ 80.

The protest is denied.

  
for James F. Hinchman  
General Counsel